LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 11 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 372

SAMUEL J. MARROSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

J. EDWARD WORTON,
Attorney for Petitioner,
SAMUEL J. MARROSO
548 Pan American Bank Bldg.
Miami, Florida 33131

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED— DID THE COURT OF APPEALS ERR IN SUSTAINING THE CONVICTION OF THE PETITIONER BY HOLDING THAT A PROSECUTOR AND AN F.B.I. AGENT COULD MAKE PREJUDICIAL AND INFLAMMATORY COMMENTS TO A JURY DURING A CRIMINAL TRIAL BY SPECIFICALLY REFERRING TO THE DEFENDANT'S STATEMENTS MADE IN THE COURSE OF AN F.B.I. INTERVIEW WITH THE DEFENDANT WHICH TOOK PLACE BEFORE THE DEFENDANT'S INDICTMENT OR ARREST WHEN THE DEFENDANT ASSERTED HIS CONSTITUTIONAL RIGHT UNDER THE FIFTH-AMENDMENT AGAINST SELF-INCRIMINATION ON ADVICE OF COUNSEL?	3
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	3
STATEMENT	5
REASONS FOR ALLOWANCE OF WRIT AND ARGUMENT AMPLIFYING REASONS	7
CONCLUSION	18

INDEX TO APPENDIX

Page

APPENDIX A — Judgment rendered by United States Court of Appeals for the Fifth Circuit dated May 5, 1964 ..... A 1

APPENDIX B — Per Curiam Opinion rendered by United States Court of Appeals for the Fifth Circuit dated May 5, 1964 ..... A 3

APPENDIX C — Order rendered by United States Court of Appeals for the Fifth Circuit denying petition for rehearing dated July 8, 1964 ..... A 5

APPENDIX D — Order rendered by United States Court of Appeals for the Fifth Circuit staying the Mandate dated July 30, 1964 ..... A 6

TABLE OF AUTHORITIES
CASES

	Page
Beaver v. **Taylor**, 1 Wall. 637, 642	17
Bradford v. **United States**, 130 F. 2d 630 (5 Cir. 1942)	13
Counselman v. **Hitchcock**, 142 U. S. 547, 12 S. Ct. 195 (1892)	8, 10, 11
DeLuna v. **United States**, 308 F. 2d 140 (5 Cir. 1962)	8, 10
Gruenwold v. **United States**, 353 U. S. 391 (1957)	12
Johnson v. **United States**, 333 U. S. 46 (1947)	13
Krulewitch v. **United States**, 336 U. S. 440 (1949)	15
Massiah v. **United States**, 84 S. Ct. 1199, 1202 (1964)	17
McCarthy v. **Arndstein**, 226 U. S. 34, 45 S. Ct. 16	8, 11
Nash v. **United States**, 54 F. 2d 1006, 1007 (2 Cir. 1932)	15
Slochower v. **Board of Higher Education**, 350 U. S. 551, 557 (1956)	11, 12
Stewart v. **United States**, 366 U. S. 1, 81 S. Ct. 941, (1961)	8, 14
United States v. **Housing Foundation of America**, 176 F. 3d 665 (3 Cir. 1949)	11
Wilson v. **United States**, 149 U. S. 60, 13 S. Ct. 765	8, 14

STATUTES

	Page
Title 18, U.S.C., Sec. 371	5
Title 18, U.S.C., Sec. 2314	5
Title 18, U.S.C., Sec. 3481	5, 6, 7, 9, 17
Title 28, U.S.C., Sec. 1254(1)	2

OTHER AUTHORITIES

Constitution of the United States	12, 13, 16
Fifth Amendment to the Constitution	3, 6, 7, 8, 9, 10, 11, 12, 17
Sixth Amendment to the Constitution	4, 6, 7, 10, 11, 17
McCormick on Evidence § 120 (1954)	10

SUPREME COURT OF THE UNITED STATES

October Term 19.....

No. _____

SAMUEL J. MARROSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

TO the HONORABLE EARL C. WARREN, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, SAMUEL J. MARROSO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 5, 1964. (Appendix "A", infra, p. A1) A petition for rehearing was denied on July 8, 1964 (Appendix "C", infra, p. A5), and judgment of the Court issued as and for an Order of stay of mandate for a period of thirty (30) days from July 8, 1964. (Appendix "D", infra, p. A6)

OPINIONS BELOW

There was no opinion in the District Court. The Per Curiam opinion of the Court of Appeals (Bell, Circuit Judge, and Ingraham, District Judge. Judge Cameron, the third Judge constituting the Court originally hearing this case, died after argument but before decision.) is reported in 331 F. 2d 601 (5th Cir., 1964) and is printed for this Court's convenience at Appendix "C", infra, p. A3.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered the 5th day of May, 1964, and a copy thereof is appended to this petition at Appendix "A", infra, p. A1. The Per Curiam opinion of the Court, dated May 5, 1964, affirmed the District Court's judgment of conviction (R. pp. 7-8). (Appendix "B", infra, p. A3) The petition for rehearing was timely filed and was denied on July 8th, 1964. (Appendix "C", infra, p. A5) An Order of stay of mandate was granted for thirty (30) days from July 8th, 1964, due to the death of petitioner's original counsel. (Appendix "D", infra, p. A6)

This petition is filed within thirty days from the date of Order of stay of mandate. Proceedings toward the surrender of the petitioner have been stayed until decision by this Court.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN SUSTAINING THE CONVICTION OF THE PETITIONER BY HOLDING THAT A PROSECUTOR AND AN F.B.I. AGENT COULD MAKE PREJUDICIAL AND INFLAMMATORY COMMENTS TO A JURY DURING A CRIMINAL TRIAL BY SPECIFICALLY REFERRING TO THE DEFENDANT'S STATEMENTS MADE IN THE COURSE OF AN F.B.I. INTERVIEW WITH THE DEFENDANT WHICH TOOK PLACE BEFORE THE DEFENDANT'S INDICTMENT OR ARREST WHEN THE DEFENDANT ASSERTED HIS CONSTITUTIONAL RIGHT UNDER THE FIFTH AMENDMENT AGAINST SELF-INCRIMINATION ON ADVICE OF COUNSEL?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment Five to the Constitution of the United States provides as follows:

"AMENDMENT V — CAPITAL CRIMES: DUE PROCESS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be

subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Amendment V. Grand Jury Indictment for Capital Crimes

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment Six to the Constitution of the United States provides as follows:

"AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Federal statute involved is Section 3481 of Title 18, United States Code which provides:

"§ 3481. Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833.

STATEMENT

The judgment of the Court of Appeals sought to be reviewed affirmed a judgment convicting the petitioner of conspiring to violate sections 371 and 2314 of Title 18, U. S. Code.

The indictment contained two counts; the first count charged the petitioner and others with transporting counterfeit securities in foreign commerce, and the second

count charged the defendants therein with conspiring so to do (R. 2). The petitioner was tried by jury and found guilty of both the substantive count and the conspiracy count. The petitioner was sentenced to three (3) years confinement and three (3) years probation (R. 7-8).

The gravamen of the reversible error allowed during trial in the District Court was the "prejudicial and inflamatory" statements made by the prosecutor and an F.B.I. agent against the petitioner. The petitioner was thereby denied his constitutional rights under the Fifth Amendment, right against self-incrimination, the Sixth Amendment, right to a fair trial, and 18 U.S.C.A. § 3481, which prohibits prejudicial comment with respect to a defendant's silence under these facts.

The petitioner, prior to indictment and arrest in the instant case, was interviewed by an F.B.I. agent. During this interview the petitioner asked to be excused so that he might confer with his counsel, whereupon the petitioner returned and refused to answer any further questions on advice of counsel.

During this criminal jury trial in the District Court, the prosecutor in his **opening statement** referred specifically to the petitioner's refusal to answer the F.B.I. agent's questions on advice of his counsel. Subsequently, when the F.B.I. agent testified during the trial he also commented specifically on the petitioner's refusal to answer the questions on advice of his counsel.

The petitioner's counsel during trial objected to these comments and motioned for a mistrial when the prosecutor (R. 26) and the F.B.I. agent (R. 448) made these

"prejudicial and inflammatory" comments. The District Court overruled these objections, but was never able to cure their fatal effect upon the jury. The petitioner renewed his motion for a mistrial at the conclusion of the defendant's case—but it was denied (R. 596). The petitioner was thereby never afforded the right to a "fair trial", and was subjected to these flagrant violations of justice.

The Court of Appeals affirmed the District Court in a Per Curiam opinion (Appendix "B", infra, p. A3).

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING REASONS

1. The decision herein sustaining conviction of the defendant is a violation of the defendant's rights under the Fifth Amendment to the United States Constitution in that the defendant has the right against self-incrimination, the right to maintain silence, and the right to be free from "prejudicial and inflammatory" comments with respect to these rights.

2. Title 18 U.S.C.A. § 3481 gives the defendant the right not to have the fact that he failed to testify or maintained silence commented upon during jury trial. The defendant's rights were breached by the "prejudicial and inflammatory" comments made by the prosecutor and F.B.I. agent.

3. The decision herein sustaining conviction of the defendant is a violation of the defendant's rights under the Sixth Amendment to the United States Constitution,

in that the defendant has the right to a **fair trial**, which was denied him in the instant case.

4. The decision herein is in conflict with the decisions of this Court in **Wilson** v. **United States**, 149 U. S. 60, 13 S. Ct. 765, and **Stewart** v. **United States**, 366 U. S. 1, 81 S. Ct. 941 (1961); in that all comment in the presence of the jury upon the defendant's rights against self-incrimination is forbidden.

5. The decision herein is in conflict with the decisions of this Court in **Counselman** v. **Hitchcock**, 142 U. S. 547, 12 S. Ct. 195 (1892) where this Court said that the right against self-incrimination applies to "any investigation", and in **McCarthy** v. **Arndstein**, 266 U. S. 34, 45 S. Ct. 16 this Court said that the privilege was not dependent on the "nature of the proceeding".

6. The decision herein is at variance and in conflict with the decision of the Fifth Circuit in **De Luna** v. **United States**, 308 F. 2d 140 (5th Cir. 1962) where the Fifth Circuit held, **inter alia**, that the Fifth Amendment right against self-incrimination also requires the right to freedom from prejudicial comment during trial concerning the exercise of the right against self-incrimination.

The Court of Appeals erred in sustaining the conviction of the petitioner by holding that a prosecutor and an F.B.I. agent could make "prejudicial and inflammatory" comments to a jury during a criminal trial, by referring specifically to the defendant's statements made in the course of an F.B.I. interview with the defendant which took place before the defendant's indictment or arrest when the defendant asserted his constitutional right under

the Fifth Amendment against self-incrimination on advice of counsel.

The question presented to this Honorable Court can be easily resolved by a logical progression of the applicable law in the area of a defendant's constitutional and statutory rights during a criminal jury trial.

The points to be argued and resolved are:

1. Does the defendant in a Federal criminal jury trial, as in the instant case, have the right to remain silent, under the Fifth Amendment right against self-incrimination? Answer—Yes

2. Does the Fifth Amendment right against self-incrimination extend not only to testimony "in any investigation" but extends the right or privilege far beyond so that it is "not dependent on the nature of the proceedings"? Answer—Yes

3. Does Section 3481 of Title 18 U. S. Code provide that "the person charged shall, at his own request, be a competent witness" and "(h)is failure to make such request shall not create any presumption against him"? Answer—Yes

4. Does the Fifth Amendment, supra, together with Section 3481 of Title 18 U. S. Code, give the petitioner in the instant case an absolute right to silence in any investigation or proceeding should he exercise the option and does it also carry with it the right to silence when asserted including complete freedom from "prejudicial and in-

flammatory" comment and harmful presumption and inferences? Answer—Yes

5. When the petitioner's "bundle" of rights outlined above has been violated, as the facts show in the instant case, can this Court say that the petitioner has had his right to a "fair trial" enforced as required by the Sixth Amendment? Answer—No

6. Therefore, it was reversible error to allow the prosecutor and the F.B.I. agent to make "prejudicial and inflammatory" comments during a Federal criminal jury trial by referring specifically to the petitioner's prior statements made in the course of an F.B.I. interview with the petitioner, which took place before the petitioner's indictment or arrest, when the petitioner asserted his constitutional right under the Fifth Amendment against self-incrimination.

With reference to the Fifth Amendment, a working maxim which once meant that no one shall be questioned until he has been first accused now means that no one shall ever be required to answer about his crime. McCORMICK ON EVIDENCE § 120 (1954)

The Fifth Amendment "must have a broad construction in favor of the right which it was intended to secure". **Counselman v. Hitchcock**, 142 U. S. 547, 562 (1892).

In **DeLuna v. United States**, 308 F. 2d 140, 144 (5th Cir. 1962) the Court of Appeals said:

"The history of the development of the right of

silence is a history of accretions, not of an avulsion.'"

Thus, it has been held by this Honorable Court in **Counselman** v. **Hitchcock**, supra, that:

> "* * * * a person should not be compelled * * * in any investigation, to give testimony that might tend to show that he himself had committed a crime."

Again, in **McCarthy** v. **Arndstein**, 266 U. S. 34, 45, S. Ct. 16, this Court has flatly asserted that the privilege or right against self-incrimination is not dependent upon the "nature of the proceeding" in which it is asserted.

As we saw in COUNSELMAN and McCARTHY above the Fifth Amendment privilege is not limited to criminal proceedings. Nor is it limited to witnesses. The Third Circuit Court of Appeals said in **United States** v. **Housing Foundation of America**, 176 F. 2d 665 (3rd Cir, 1949) that the right of a witness not to give incriminating answers and the right of an accused not to take the stand must be distinguished, although both come within the protection of the Fifth Amendment.

We respectfully submit that the language and history of the Fifth and Sixth Amendments to the Constitution and section 3481 of Title 18 U. S. Code, is the language of **rights** and **freedoms**. These are not special benefits which require a strict construction.

Justice Clark, in **Slochower** v. **Board of Higher Edu-**

cation, 350 U. S. 551, 557 (1956) said that even in situations not criminal, the:

> "* * * privilege against self incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

Therefore, we can readily see that it makes no difference whether the "prejudicial and inflammatory" comments come from a co-defendant's counsel, the Court or the prosecutor. The crucial test which must be applied is, WHAT EFFECT DID THE COMMENT HAVE ON THE JURY? If the privilege or right against self-incrimination is to be effective, and if we hope to preserve the presumption of innocence of the accused, then we must follow the Constitution, the statutes and the cases and prohibit "prejudicial and inflammatory" comments. To emphasize by comment the fact that the petitioner relied upon his Fifth Amendment right confused the jury as to the presumption of innocence of the petitioner.

In **Grunewold** v. **United States**, 353 U. S. 391 (1957), Justice Harlan, speaking for the majority of this Honorable Court, and referring to the meaning and history of the Fifth Amendment, said:

> "* * * one of the basic functions of the privilege * * * to protect 'the innocent who otherwise might be ensnared by ambiguous circumstances' (Slochower)"

In a concurring opinion Justice Black said:

> "(There are) no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of these constitutional privileges is largely destroyed if persons can be penalized for relying on them."

Justice Frankfurter in **Johnson** v. **United States**, 333 U. S. 46 (1947) said:

> "Federal judges are not referees at prize fights but functionaries of justice."

Therefore, looking at the judge and the accused, the judge is charged with the responsibility of protecting the accused by making certain the trial is the "fair" one demanded by the Constitution. The narrow view of the District Court and the Court of Appeals in the instant case leads to a **complete nullification** of the petitioner's constitutional rights.

The petitioner had the constitutional right to expect that the jury would have no presumption or inference of guilt from the exercise of his right not to answer any further questions during the interview with the F.B.I. agent. **Bradford** v. **United States**, 130 F. 2d 630 (5th Cir, 1942) Cert. denied, 317 U. S. 683. The petitioner, Marroso. has been denied his constitutional rights.

Above all, the petitioner has the right to expect that all comment in the presence of the jury upon his omission to answer any further questions during the F. B. I.

interview would be forbidden. **Wilson v. United States, 194 U. S. 60 (1893); Stewart v. United States, 366 U. S. 1 (1961).**

Ironically, the District Court assumed that the instructions to the jury would neutralize the effect of the comments made by the prosecutor and the F.B.I. agent. But once again we must consider the effect upon the jury. At the very beginning of the trial the prosecutor for the United States of America made these "prejudicial and inflammatory" comments. The effect on the jury was fatal at this point. After all, this was the government speaking to the jury. The conclusion of the jury then was, "Why did Marroso refuse to talk — He must be guilty."

Then, to make a bad situation worse, if possible, the F.B.I. agent, made the same "prejudicial and inflammatory" comments to the jury. Marroso did not have a chance; the government might just as well have put him in prison without a trial, because the trial, at this point, was no more than a "farce". A careful study of the record will prove to this Honorable Court that the government did not prove their case against the petitioner and he should have been acquitted with defendant Green.

The District Court did not attempt to cure the fatal reversible error committed by the prosecutor and the F.B.I. agent. The only slight mention made in the Court's instruction to the jury was weak and feeble. The District Court said (R. 610):

> "No presumption of guilt and no inference of any kind is to be cast upon any of the defendants

> because they did not take the stand or because they did not produce evidence, or because they did not produce as much evidence as did the government."

We find out of 28 pages of instructions to the jury (R. 605-633), the District Court devoted a mere 46 words in this regard, which in fact were not even on point with the "prejudicial and inflammatory" comments made by the prosecutor and the F.B.I. agent. Hence, we can say there was no instruction to the jury in an effort to neutralize the effect of these fatal comments upon the members of the jury. Without any instruction to the jury to undo the prejudicial effect of the reference specifically made to the petitioner's exercise of his right against self-incrimination during the F.B.I. interview, by both the prosecutor and the F.B.I. agent, the **seed of presumption of guilt was well planted.** We should not be surprised that it **germinated.**

In **Krulewitch** v. **United States, 336** U. S. **440** (1949) Justice Jackson said:

> "(T)he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

To the same effect is the statement by Judge Learned Hand in **Nash** v. **United States,** 54 F. 2d **1006, 1007** (2 Cir 1932), when he said:

> "(This) recommendation to the jury * * * (is) a mental gymnastic which is beyond, not only their power, but anybody's."

It is a weak and shallow argument to say that in any event this was merely **harmless error.** The government was not able to prove the guilt of the petitioner. The **record** shows no guilt on the part of the petitioner. The harmless error rule has restricted applicability in criminal cases. This is so, because the petitioner has a carefully guarded right to have his guilt adjudged by a jury.

The Court of Appeals did not face the question of error squarely in their Per Curiam opinion which affirmed the District Court. In fact, they confusedly said:

> "This was no more than evidence of surrounding circumstances tending to illuminate the principal fact in such a way as to reflect the entire transaction or conversation and place the whole in a true light."

When the great weight of legal authority in this country stresses the closely guarded constitutional and statutory rights afforded an accused in a criminal trial, the denial of these very same rights belonging to the petitioner, as in the instant case, is an affront to this Honorable Court and every American who takes pride in our judicial system and our Constitution.

How the Court of Appeals could hold that these "prejudicial and inflammatory" comments were admissible because they tended to "illuminate the principal fact in such a way as to reflect the entire transaction. . . . " is a completely unconscionable position. Nothing was "illuminated", no "principal fact" was brought to light, except the fact that by virtue of their admissibility the peti-

tioner was denied his constitutional right to a "fair trial" under the Sixth Amendment.

This is so because the petitioner was denied his Fifth Amendment right against self-incrimination and his statutory right under section 3481 of Title 18 U. S. Code.

The Court of Appeals Per Curiam opinion quoted above is as out of context to the question presented to that Court on appeal in the instant case, as that quote was when it was used by the government in their brief for appellee in the instant case (Brief for Appellee, p. 12).

The government cites **Beaver v. Taylor, 1 Wall. 637, 642** in their Brief for Appellee as authority for that bit of "legal mumble jumble". By repeating that innocuous sentence the Court of Appeals has affirmed by the use of vague generalities and confusion the denial of an accused his constitutional right to a "fair trial" and has overturned our entire theory of law, order and justice.

In **Massiah v. United States, 84 S. Ct. 1199, 1202** (1964), this Honorable Court in dealing with the same basic constitutional principals and rights of an accused, but in a different fact pattern, solidly established "guide lines" and "ground rules" for a "fair trial" when at 1202 this Court said:

> "Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies."

This not only applies to the right of "assistance of coun-

sel", but to all constitutional rights of an accused. The petitioner here has been denied his basic rights.

The government calls the error an "insignificant trifle" (Brief for Appellee, p. 14). Apparently the Court of Appeals was inclined to take this narrow view which would lead to complete nullification of the petitioner's constitutional rights.

The error was properly preserved for appeal and in the circumstances of this case the error is serious and reversible.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

J. EDWARD WORTON
Attorney for
SAMUEL J. MARROSO,
Petitioner
548 Pan American Bank Bldg.
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that several copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was on this the 7th day of August, 1964, mailed to the Hon. William A. Meadows, United States Attorney for the Southern District of Florida, United States Courthouse, Miami, Florida; to Jerome Nelson, Attorney, Dept. of Justice, Washington 25, D. C.; and to the Solicitor General, Department of Justice, Washington 25, D. C.

J. EDWARD WORTON

INDEX TO APPENDIX

Page

APPENDIX A — Judgment rendered by United States Court of Appeals for the Fifth Circuit dated May 5, 1964 ..... A 1

APPENDIX B — Per Curiam Opinion rendered by United States Court of Appeals for the Fifth Circuit dated May 5, 1964 ..... A 3

APPENDIX C — Order rendered by United States Court of Appeals for the Fifth Circuit denying petition for rehearing dated July 8, 1964 ..... A 5

APPENDIX D — Order rendered by United States Court of Appeals for the Fifth Circuit staying the Mandate dated July 30, 1964 ..... A 6

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20236

D. C. Docket No. 399-62-Cr-EC

SAMUEL J. MARROSO and JOHN JACOB SAMARIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before BELL, Circuit Judge and INGRAHAM*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of

---

*Judge Cameron, the third judge constituting the Court originally hearing this case, died after argument but before decision. Consequently, this decision and opinion is rendered by a quorum pursuant to Title 28 USCA, Sections 46(c) and (d).

the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be, and the same are hereby affirmed.

Issued as Mandate: May 5, 1964

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20236

SAMUEL J. MARROSO and JOHN JACOB SAMARIN,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(May 5, 1964.)

Before BELL, Circuit Judge and INGRAHAM,* District Judge.

PER CURIAM: Appellants were convicted of a conspiracy to transport counterfeit securities in foreign commerce in violation of 18 USCA, § 371 and 18 USCA,

*Judge Cameron, the third judge constituting the Court originally hearing this case, died after argument but before decision. Consequently, this decision and opinion is rendered by a quorum pursuant to Title 28 USCA, § 46 (c) and (d).

§ 2314. Both appellants contend their convictions are invalid, because the lower court erred in admitting into evidence post conspiracy statements of co-defendants. In addition, the appellant Marroso contends that the lower court erred in failing to grant his motion for mistrial because of the admission into evidence of the testimony of an F.B.I. agent concerning the termination by Marroso of an interview with the agent on advice of counsel.

After a careful examination of the entire record, we find to the contrary. The evidence sustained the conviction of both appellants. A common purpose and plan may be inferred from a development and a collocation of circumstances. **Glasser v. United States**, 315 U.S. 60 (1942). It is well settled that, in a joint trial, post conspiracy declarations by co-defendants are admissible against the declarant under proper limiting instructions. **Delli Paoli v. United States**, 352 U.S. 232 (1957). The court gave precise limiting instructions both prior to the receipt of the statements and in the final charge.

Lastly, it was not error to fail to grant the motion for mistrial because of the admission into evidence of the testimony of the F.B.I. agent concerning his interview with Marroso wherein Marroso answered certain questions and then refused to answer further questions on advice of counsel. This was no more than evidence of surrounding circumstances tending to illuminate the principal fact in such a way as to reflect the entire transaction or conversation and place the whole in a true light.

The convictions are AFFIRMED.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,236

SAMUEL J. MARROSO and JOHN JACOB SAMARIN,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

Appeals from the United States District Court for the Southern District of Florida

---

ON PETITIONS FOR REHEARING
(July 8, 1964)

Before BELL, Circuit Judge, and INGRAHAM, District Judge

PER CURIAM:

It is ORDERED that the separate petitions for rehearing filed by appellants, Samuel J. Marroso and John Jacob Samarin, in the above entitled and numbered cause be, and they are, hereby DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 20,236

SAMUEL J. MARROSO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER

THIS CAUSE, coming on to be heard upon the application of substitute counsel for a Stay of Mandate until substitute counsel may examine into the file of the Appellant, SAMUEL J. MARROSO, and the Court being advised in the premises, it is

ORDERED:

That the Mandate shall be stayed for a period of 30 days from the 8th day of July, 1964.

DONE and ORDERED at New Orleans, Louisiana, this 30th day of July, 1964.

JOE INGRAHAM

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 8 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No 471

JOHN JACOB SAMARIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Of Counsel:
SHEA & GARDNER,
734 – 15th Street, N.W.,
Washington 5, D. C.

ALFRED L. SCANLAN,
734 - 15th Street, N.W.,
Washington 5, D. C.

JAMES EASLY,
524 Terminal Tower Building,
Cleveland, Ohio,
Attorneys for Petitioner.

September 8, 1964.

TABLE OF CONTENTS

Item	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Constitutional Provision Involved	3
Statement of the Case	4
1. *Proceedings in the Trial Court*	4
2. *Evidence Allegedly Connecting the Petitioner With the Conspiracy and With the Unlawful Transportation in Foreign Commerce*	5
3. *The Evidence Asserted Against the Convicted Co-defendant*	7
4. *Certain Motions in the Trial Court*	9
Reasons for Granting the Writ	9
A. *Illegal Transportation in Foreign Commerce Was Not Proved*	10
B. *Petitioner Was Prejudiced By the Admission of Evidence in Violation of His Co-Defendant's Privilege Against Self-incrimination*	13
Conclusion	18
Appendix A	19

CITATIONS

Cases:

Breithaupt v. *Abram*, 352 U.S. 432, 443	15
Bruno v. *United States*, 308 U.S. 287, 292	13
Christoffel v. *United States*, 338 U.S. 84, 90	10, 11
Counselman v. *Hitchcock*, 142 U.S. 547	14
DeLuna v. *United States*, 308 F. 2d 140, 154 (C.A. 5, 1962)	14
District Sales Co. v. *United States*, 319 U.S. 703, 711	12
Escobedo v. *Illinois*, 378 U.S. 478	14
Garner v. *Louisiana*, 368 U.S. 157, 163	12
Hale v. *Henkel*, 201 U.S. 43, 69	15
Ing v. *United States*, 278 F. 2d 362, 367 (C.A. 9, 1960)	14
Ingram v. *United States*, 360 U.S. 672, 680	12

Page

In Re Turner, 309 F. 2d 69, 71 (C.A. 2, 1962) 14
Jones v. *United States*, 362 U.S. 257, 263 16
Krulewitch v. *United States*, 336 U.S. 440, 446 12
McDonald v. *United States*, 335 U.S. 451, 456 ..... 10, 16
Marroso v. *United States*, October 1964 Term, No. 372 13
Milton v. *United States*, 110 F. 2d 556, 558, 71 App. D.C. 394 (1940) 13, 18
Petition of Groban, 352 U.S. 330 14
Rogers v. *United States*, 340 U.S. 367, 371 15
Stewart v. *United States*, 366 U.S. 1 13
Thompson v. *City of Louisville*, 362 U.S. 199 ..... 10, 12
Ullmann v. *United States*, 350 U.S. 422, 426 15
United States v. *Johnson*, 268 U.S. 220, 227 11
United States v. *Ragland*, 306 F. 2d 732, 736 (C.A. 4, 1962) 14
United States v. *Sprengel*, 103 F. 2d 876, 883 (C.C.A. 3, 1939) 14
Washington v. *United States*, 357 U.S. 348 ..... 10, 13
Weiss v. *United States*, 308 U.S. 321, 220 16
Wilson v. *United States*, 149 U.S. 60 13

Statutes:

18 U.S.C. 371 ..... 1, 3, 4, 10
18 U.S.C. 2314 ..... 1, 3, 4, 10
18 U.S.C. 3231 2
18 U.S.C. 3481 ..... 4, 13
28 U.S.C. 1254(1) 2
28 U.S.C. 1291 2
Sec. 605 of the Federal Communications Act 16

Miscellaneous:

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland Ed., 1951), § 333 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

JOHN JACOB SAMARIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner, John Jacob Samarin, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The United States District Court for the Southern District of Florida entered no opinion, petitioner having been convicted in that court, following a jury trial, of: (1) the transportation of counterfeit securities in foreign commerce, in violation of 18 U.S.C. 2314; and (2) conspiracy to violate the aforesaid statute, as prohibited by 18 U.S.C. 371 (R. 9).[1]

---

[1] References to the two volume mimeographed record in the Court of Appeals for the Fifth Circuit are designated herein as "(R.)."

Motions for a mistrial and for a directed verdict of acquital were denied by the District Court from the bench without written opinion (R. 555-565 and R. 594-596). The *per curiam* opinion of the Court of Appeals is reported at 331 F. 2d 601 (C.A. 5, 1964), and a copy thereof is attached to this petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on May 5, 1964. A timely motion for rehearing was denied by the Court of Appeals on July 8, 1964. Upon application of the petitioner, Mr. Justice White, on August 4, 1964, ordered that the time for filing a petition for writ of certiorari be extended to and including September 7, 1964. That date being Labor Day, a national holiday, this petition was filed on September 8, 1964.

Jurisdiction of the District Court was based on 18 U.S.C. 3231. Jurisdiction of the Court of Appeals rested on 28 U.S.C. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

This case presents for decision two questions. These are:

1. Did the Court of Appeals err in sustaining the trial court's denial of petitioner's motion for directed verdict of acquital, in that there was no evidence to prove the transportation in foreign commerce, between Miami, Florida and Nassau, Bahama Islands, of the 265 counterfeited Ohio Turnpike revenue bonds which were introduced in evidence by the prosecution and which were the subject matter of the indictment.

2. Did the Circuit Court of Appeals err (and was peti-

tioner prejudiced thereby) in sustaining the trial court's denial of timely motions for mistrial and for directed verdict of acquital made by counsel representing the co-defendant, where the motions were directed to comment by the prosecution and admission of evidence respecting a co-defendant's refusal to answer an F.B.I. agent's questions about the offenses charged, and where counsel for this petitioner joined in the motion for mistrial.

Statutes and Constitutional Provision Involved

18 U.S.C. 371 reads in part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * * * *

18 U.S.C. 2314 provides in pertinent part as follows:

> * * * * * * *
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;
>
> * * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * * * * *

Amendment Five to the Constitution of the United States provides as follows:

> "Amendment V. Grand Jury Indictment for Capital Crimes
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. 3481 provides as follows:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Statement of the Case

1. *Proceedings in the Trial Court.* On August 23, 1962 an indictment was returned against the petitioner and two other defendants. The indictment contained two counts. The first charged a violation of 18 U.S.C. 2314 by the unlawful transportation in foreign commerce from Miami Beach, Florida to Nassau, Bahama Islands, of counterfeited securities, represented by 265 counterfeited $1,000 State of

Ohio Turnpike revenue bonds, payable June 1, 1992, and bearing serial numbers M13205, M132053 to and including M132121, M132127 to and including M132177, M132179 to and including M132322 (R. 2). The second count charged a conspiracy under 18 U.S.C. 371 on the part of the petitioner and the two other defendants to commit the above-stated violation of 18 U.S.C. 2314. (R. 3). The trial court appointed counsel for the petitioner one day before trial. Trial before a jury in the United States District Court for the Southern District of Florida commenced on December 3, 1962, and was completed on December 13, 1962.

The petitioner and one other defendant were convicted on both counts, while the third defendant was acquitted (R. 7-10). Petitioner was sentenced to five years imprisonment on each count, the sentences to run concurrently (R. 10). The other convicted defendant was sentenced to three years imprisonment on the conspiracy count, but was placed on probation for three years as to the substantive count (R. 8).

2. *Evidence Allegedly Connecting the Petitioner With the Conspiracy and With the Unlawful Transportation in Foreign Commerce.* The Government's evidence showed that the petitioner very briefly came into possession of a genuine Ohio Turnpike revenue bond some time in the middle of October, 1960 (R. 361). Petitioner maintained (R. 440-442), and his story was corroborated (R. 570-571), and uncontradicted that he purchased the aforesaid revenue bond in behalf of one Fox after a third party had recommended several different bonds for purchase by Fox. Fox told the petitioner to pick up the bond and then sent the money for its purchase to the petitioner through a third party. Fox received the bond the next day, the petitioner having transmitted it through the third party (R. 572). Three days later, Fox traded the bond for a half interest

in marine diesel engines owned by the third party (R. 571-573).

The Government's evidence also showed that in the summer of 1960, the petitioner had asked a Cleveland broker for an Ohio Turnpike bond in "street form," explaining that he wanted to counterfeit a bond. (R. 72). The evidence also indicated that in October and again in November of 1960 the petitioner approached three Cleveland printers to ask if they could print "certificates" or "bonds." (R. 174, 175, 185). There was no evidence introduced to establish that any printer made a counterfeit bond or bonds for the petitioner or for any of the other defendants, either in October or November, 1960, or at any time.

It was shown by the evidence that the petitioner knew one of the co-defendants, Marroso by name, having met the latter in connection with lawful and legitimate transactions in Ohio. These meetings occurred in June, 1960, some six months prior to the unlawful transportation of the counterfeit bonds charged in the indictment (R. 397-398, 401, 402).

The Government's evidence demonstrated that the 265 Ohio Turnpike revenue bonds which were introduced in evidence at the trial were made from the genuine Ohio Turnpike bond which very briefly had been in the possession of the defendant in October, 1960. (R. 521-524, 532). A number of other persons had possession of, or access to, this bond both prior and subsequent to the time petitioner had possession of it (R. 571-573).

The last piece of evidence relied upon by the Government against the petitioner was the fact that on or about January 3, 1961, a telephone call was placed from the Miami, Florida hotel room of the co-defendant Marroso to a party named "Samarin" in Cleveland. At that time, the petitioner was living in a house whose telephone was assigned

the number to which the Miami call had been placed (R. 391, 395-396).

There was no evidence introduced by the United States to establish that the petitioner actually transported, or assisted in the transportation of, 265 counterfeited Ohio Turnpike revenue bonds, as charged in the indictment, from Miami, Florida to Nassau, Bahama Islands, on or about January 9, 1961. Nor was there evidence to prove that the 265 counterfeited Ohio Turnpike revenue bonds, as expressly enumerated and set out in the indictment, which were sold through a Nassau banker, Green, the co-defendant who was acquitted, to innocent purchasers for value in the Bahamas in early January, 1961, were the same Ohio Turnpike revenue bonds as those which had been in the possession of the two co-defendants, not including the petitioner, in Miami, Florida during the period December 26, 1960 through January 9, 1961. There was no evidence, either, to show that the counterfeited bonds were printed in the United States rather than in the Bahamas, or elsewhere. No identification was ever made of the serial numbers on the 266 bonds which were in the possession of the two other co-defendants in Miami in late December of 1960 and early January of 1961, other than that such bonds were within the 132,000 series among the bonds issued by the Ohio Turnpike Authority. Nor was there any proof offered that the Miami bonds were counterfeit. The 266 bonds that appeared in Miami were part of a series (the 132,000 series) consisting of one thousand (1,000) bonds. The 265 counterfeit bonds which were sold in the Bahamas and which form the subject matter of indictment and which were identified by serial number, also formed part of the 132,000 series.

3. *The Evidence Asserted Against the Convicted Co-defendant.* This petitioner will not attempt to provide here

any detailed statement of the evidence on which the prosecution relied in its case against the other co-defendant, Marroso, who was convicted along with the petitioner and whose conviction also was upheld by the Court of Appeals (App. A). On August 8, 1964, Marroso filed a petition for certiorari with this Court, No. 372, October Term, 1964. Petitioner accepts and incorporates by reference herein that portion of Marroso's "Statement" appearing at pages 6-7 of his aforesaid petition for certiorari. Petitioner, however, notes also the fact that as to Marroso, as in his own case, there was no proof offered to identify the bonds appearing in Miami in late December, 1960 as counterfeit, or as the same bonds which were sold by Green, the acquitted defendant, in Nassau in January, 1961.

Prior to the indictments which were returned against the defendants in this case, an agent of the Federal Bureau of Investigation interrogated Marroso in Detroit, Michigan, where the latter had his place of business (R. 445-446). Marroso was accompanied to the interview by his own attorney (R. 446). Marroso answered some questions put to him by the agent. Then the F.B.I. man asked him why he had been in Florida during the c[illegible]ical period when Ohio Turnpike bonds appeared in that city. Marroso asked to be excused to consult his attorney who was in the next room. On his return, Marroso explained that his attorney had instructed him not to answer any more questions. This terminated the interview (R. 446).

During the course of the prosecution's opening statement, counsel for the Government mentioned that Marroso, when being interviewed by the F.B.I. agent, had refused to answer any more questions on advice of his counsel (R. 26). Marroso's trial counsel immediately moved for a mistrial "on the grounds of prejudicial remarks made by Government counsel" during the course of his opening statement.

The motion was promptly denied from the bench (R. 26).

The agent of the Federal Bureau of Investigation who interviewed Marroso in Detroit, was called as a witness for the prosecution (R.444). During the course of the trial the Court ruled that an objection in behalf of one defendant would be taken as an objection for all. Prior to the agent taking the stand, counsel for Marroso asked the Court to caution Government counsel against commenting on, or adverting to, the fact that his client had refused to answer questions put to him by the F.B.I. agent on the advice of his counsel (R. 414). The Court refused so to caution Government counsel (R. 415). Thereafter, the agent testified concerning his Detroit interview of Marroso, including the fact that Marroso had refused to answer questions on advice of counsel (R. 446).

4. *Certain Motions in the Trial Court.* When the Government rested its case, counsel for all the defendants moved for judgments of acquittal under both counts of the indictment (R. 548-564). These were denied from the bench at the conclusion of short oral argument (R. 565). Finally, when all the evidence was in, all motions for judgment of acquittal were renewed and again denied from the bench (R. 593). Counsel for Marroso also renewed, and counsel for the instant petitioner at this time also joined in, a motion for mistrial based on the admission of the testimony of the agent of the Federal Bureau of Investigation regarding his interview of Marroso (R. 594). Judge Choate once more denied the motion in a ruling from the bench (R. 596).

Reasons for Granting the Writ

Petitioner seeks certiorari to review the affirmance by the United States Court of Appeals for the Fifth Circuit both (a) of his conviction in the trial court of a violation

of 18 U.S.C. 2314, and (b) of his conviction, under 18 U.S.C. 371, of conspiracy to violate the aforesaid section. In brief, the grounds on which his request for the writ of certiorari rest are: (1) the petitioner's conviction lacks the requisite evidentiary support, *Thompson* v. *City of Louisville*, 362 U.S. 199 and *Washington* v. *United States*, 357 U.S. 348, in that there was a failure to prove beyond a reasonable doubt an essential element of the crime with which he was charged, namely, the transportation in foreign commerce of the counterfeited bonds which form the specific gravamen of the indictment and which were introduced in evidence against the petitioner. *Christoffel* v. *United States*, 338 U.S. 84, 90; and (2) the sanctioning by Judge Choate of a substantial impairment of the co-defendant's privilege against self-incrimination permitted the prejudicial use against the petitioner, as well as the co-defendant, of improper and highly damaging testimony, *McDonald* v. *United States*, 335 U.S. 451, 456. In more detail, petitioner's reasons are:

A. *Illegal Transportation In Foreign Commerce Was Not Proved.* The statute with which the defendants were charged of having violated, 18 U.S.C. 2314, provides in pertinent part as follows:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;
>
> * * * * * * *

Under the statute in question clearly the Government is obliged to prove, beyond a reasonable doubt, all the elements of the offense prescribed thereby, including the

transportation in foreign commerce of counterfeited securities. At trial, there was no direct evidence whatsoever that either the petitioner or any of the two co-defendants actually transported counterfeit bonds from Florida to Nassau. The Government relied exclusively upon circumstantial evidence purporting to show: (1) that 265 counterfeit bonds had been sold by one of the co-defendants (who was acquitted by the jury) in Nassau in January, 1961; and (2) that two of the co-defendants, but not the petitioner, had possession of 266 Ohio Turnpike bonds coming within the same general series (the 132,000 series) as the counterfeit bonds, in Miami, Florida, in late December of 1960. However, no proof at all was offered by the prosecution to show that the 265 bonds which were sold in Nassau were the same bonds that had been in the possession of Marroso and the other alleged co-conspirator in Miami, Florida in late December, 1960. Nor is there any proof that the bonds that appeared in Miami during the period stated were counterfeit bonds, or that the bonds found in Nassau had been counterfeited in the United States, rather than in Nassau or some other foreign jurisdiction. It is elementary that an essential part of a fair procedure resulting in the conviction of a crime is that all the elements of the crime charged shall be proved beyond a reasonable doubt. *Christoffel* v. *United States*, 338 U.S. 84, 90. In the instant case, the indispensable element of unlawful transportation, as charged in the indictment, was not so proved.

The petitioner is aware that this Court ordinarily will not grant certiorari "to review or to discuss specific facts." Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland Ed., 1951), § 333; *United States* v. *Johnson*, 268 U.S. 220, 227. On the other hand, the Court has not hesitated to grant certiorari, even

in cases coming to it from state courts of last resort, to review the sufficiency of the evidence in criminal cases where the conviction under review was so totally devoid of evidentiary support as to result in gross unfairness. *Thompson* v. *City of Louisville*, 262 U.S. 199; *Garner* v. *Louisiana*, 368 U.S. 157, 163. Such unfairness exists here.

Petitioner also suggests that this Court may have a special obligation to preserve the standards of fair criminal procedure and the sufficiency of the evidence to support a conviction when the conviction reviewed is one arising out of a federal conspiracy case. As this Court has observed, the "modern law of conspiracy is largely evolved by the judges." *Krulewitch* v. *United States*, 336 U.S. 440, 446. Under indictments charging criminal conspiracy, opportunities abound, unless trial and reviewing courts are vigilant, to convert the crime of conspiracy into a "drag-net to draw in all substantive crimes,", *Ingram* v. *United States*, 360 U.S. 672, 680, "by piling inferences upon inferences . . .", *District Sales Co.* v. *United States*, 319 U.S. 703, 711. To permit, as occurred in this case, the Government to omit offering any proof that specific securities which were sold outside of the United States were the same securities as those which earlier were in the possession of one of the defendants within the United States is to abuse the liberality which the federal courts have tolerated in establishing conspiracy convictions.

Such misapplication of the federal judicial power appears even more regretable in petitioner's case. Absence of proof of illegal transportation apart, his nexus with the alleged unlawful transportation of the counterfeited bonds, as charged in the indictment, is at best extremely tenuous. Even conceding, however, that it would be enough if proof of the actual transportation of the counterfeit bonds listed in the indictment were established, lacking

such indispensable proof, the decision below should be reviewed by this Court in the exercise of its supervision over federal criminal procedure, and reversed "because of insufficiency of the evidence," *Washington* v. *United States*, 357 U.S. 348.

B. *Petitioner Was Prejudiced By the Admission of Evidence in Violation of His Co-defendant's Privilege Against Self-incrimination.* This petitioner concurs with, and in general associates himself in, the arguments expressed in the petition for certiorari filed in *Marroso* v. *United States*, No. 372, October, 1964 Term. That petition sets out, at pages 6 and 7 thereof, the facts of record on the basis of which it is established, we believe, that the prosecution's comments on Marroso's failure, on advice of counsel, to answer questions put to him by an agent of the Federal Bureau of Investigation, and the subsequent admission into evidence of the agent's testimony to that effect, offended Marroso's constitutional privilege against self-incrimination, violated 18 U.S.C. 3481,[2] and were gravely prejudicial to Marroso's right to a fair trial.

It has long been the law, at least in the federal courts, that comments by the prosecution regarding the failure of a defendant to testify constitute reversible error. *Wilson* v. *United States*, 149 U.S. 60; *Bruno* v. *United States*, 308 U.S. 287, 292; *Stewart* v. *United States*, 366 U.S. 1. Uniform decisions to the same effect among the Circuit Courts of Appeal are legion; see e.g., *Milton* v. *United States*, 119 F. 2d 556, 558, 71 App.D.C. 394 (1940,; *United*

[2] 18 U.S.C. 3481 states that:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

States v. *Sprengel*, 103 F. 2d 876, 883 (C.C.A. 3, 1939); *Ing* v. *United States*, 278 F. 2d 362, 367 (C.A. 9, 1960); and *United States* v. *Ragland*, 306 F. 2d 732, 736 (C.A. 4, 1962). Indeed, the Court of Appeals for the Fifth Circuit itself recently, in *DeLuna* v. *United States*, 308 F. 2d 140, 154 (C.A. 5, 1962), held, in a comprehensive and singularly illuminating opinion by Judge Wisdom tracing the increasingly more complete protection afforded by the Fifth Amendment, that comment by a defense counsel regarding the failure of a co-defendant (not his client) to testify constituted prejudice to such co-defendant which could not be cured by any instructions.

So as far as Marroso is concerned, therefore, the pertinent rulings below would appear to depart from authoritative holdings of this Court and conflict with a host of decisions by other Circuit Courts, as well as with the Fifth Circuit's prior decision in the *DeLuna* case, *supra*. The fact that Marroso availed himself of his privilege during the investigative phase of these proceedings, before the indictments were returned, is of no distinguishing consequence. *Counselman* v. *Hitchcock*, 142 U.S. 547; *Petition of Groban*, 352 U.S. 330. To the contrary, it has been held that a witness in an investigative proceeding, even one who may be a prospective defendant, must claim his privilege against self-incrimination at his peril as particular questions are asked of him. *In Re Turner*, 309 F. 2d 69, 71 (C.A. 2, 1962). This is what Marroso did, acting upon advice of counsel.

Any doubt as to the applicability of the general doctrines respecting the privilege has been dispelled by this Court's very recent landmark decision in *Escobedo* v. *Illinois*, 378 U.S. 478. There, in an opinion by Mr. Justice Goldberg, it was held that when an investigatory proceeding "focuses on the accused" then "our adversary system begins to oper-

ate" and, that at such time "the accused must be permitted to consult with his lawyer." In *Escobedo*, as in the instant case, the pertinent interrogation "was conducted before petitioner was formally indicted." If, under the circumstances presented, the Constitution gave Marroso (1) the right to consult with his lawyer, and (2) the right to invoke his privilege of remaining silent or refusing to answer, *a fortiori* it would appear to forbid at trial any impairment of that right to remain silent on advice of counsel with whom he had consulted before replying to his interrogator.

Concededly, the right against self-incrimination, and perhaps also the right guaranteed by 18 U.S.C. 3481, are personal to the witness who relies on them. *Rogers v. United States*, 340 U.S. 367, 371; *Hale* v. *Henkel*, 201 U.S. 43, 69. Therefore, if Marroso had waived rights guaranteed him by the Fifth Amendment and by the statute referred to above, that would have put an end to the matter, so far as this petitioner is concerned. Obviously, he could not rely on constitutional or statutory rights which were personal to a witness or to a defendant who had waived such rights or failed to assert them in time.

However, that is not this case. Moreover, as Mr. Justice Douglas has said, under "our system of government, the police cannot compel people to furnish the evidence necessary to send them to prison." *Breithaupt* v. *Abram*, 352 U.S. 432, 443. Nor do we believe that other people should be sent to prison on the basis of evidence which another was unlawfully compelled to furnish the authorities. The constitutional protection against self- incrimination is "not to be interpreted in [such] a hostile or niggardly spirit." *Ullman* v. *United States*, 350 U.S. 422, 426.

Assuming, therefore, that Marroso's rights were violated by what occurred during the trial, the further question is whether the petitioner can complain of the results of such

violations when they have an adverse impact on his own defense? We find no case squarely in point. However, persuasive analogy lies in this Court's decision in *McDonald* v. *United States*, 335 U.S. 451, 456. That case involved the joint trial of two defendants charged with operating an illegal lottery. Articles seized by the police were admitted in evidence over the objection that the evidence had been obtained in violation of the Fourth Amendment. This Court held that the seizure had been unconstitutional and that, therefore, the co-defendant who owned the premises upon which the illegal search and seizure had taken place was entitled to a reversal of his conviction. However, since the unlawfully seized evidence had been introduced against both defendants, the Court was required to consider whether the evidence had been properly used against the defendant, who "had no right of privacy that was broken" by the search, 335 U.S. at 456. Finding prejudice to this defendant, the Court held his conviction should be reversed also. See also *Weiss* v. *United States*, 308 U.S. 321, 330, where evidence introduced in violation of Section 605 of the Federal Communications Act was not permitted to be used against several co-conspirators even though other co-conspirators had consented to its introduction.

Surely, the privilege against self-incrimination provided by the Fifth Amendment is no less important than the Fourth Amendment's prohibition against unreasonable search and seizure. If evidence obtained in violation of either one of these constitutional safeguards substantially prejudices a defendant, even though he is not the person who would have been entitled to claim the constitutional privilege in the first instance, he should, nevertheless, be able to object to the use of such evidence against him. Any other result, as this Court put it in *Jones* v. *United States*, 362 U.S. 257, 263, would not be "consonant with the ameni-

ties, to put it mildly, of the administration of criminal justice . . . .".

Nor can it be argued that any harm to this petitioner as a consequence of the introduction of the evidence in question was cured by appropriate instructions from the trial court to the jury. On the contrary, the trial court's instructions, however technically correct they might appear, did not exorcise, but rather exacerbated, the resulting harm. Judge Choate expressly admonished the jury as follows:

> If and when it does appear from the evidence that a conspiracy existed, if it does so ever appear, and that a defendant was one of the members, then the acts thereafter knowingly made by any person likewise found to be a member, may be considered by the jury as evidence in the case as to every defendant found to have been a member, even though the acts and statements were made or occurred in his absence and without the knowledge of the defendant, provided always, however, such acts and statements were knowingly done and made during the continuance of the conspiracy and in furtherance of the object or purpose of such conspiracy (R. 627).

Under that instruction, the adverse inference that members of the jury almost surely must have drawn from Marroso's refusal to answer the federal agent was almost as certainly extended to the petitioner. If the challenged evidence was improperly admitted against Marroso, then the rationale and result in *McDonald*, *supra*, require the conclusion that it was improperly admitted as to petitioner.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted. Petitioner also respectfully requests that the Court grant the petition for writ of certiorari filed in *Marroso* v. *United States*, No. 372 this Term, and that both cases be consolidated for argument on the merits.

Respectfully submitted,

Of Counsel:

SHEA & GARDNER,
734 – 15th Street, N.W.,
Washington 5, D. C.

ALFRED L. SCANLAN,
734 – 15th Street, N.W.,
Washington 5, D. C.

JAMES EASLY,
524 Terminal Tower Building,
Cleveland, Ohio,
Attorneys for Petitioner.

September 8, 1964.

APPENDIX A

May 5, 1964

Before BELL, Circuit Judge and INGRAHAM,* District Judge.

PER CURIAM: Appellants were convicted of a conspiracy to transport counterfeit securities in foreign commerce in violation of 18 USCA, § 371, and 18 USCA, § 2314. Both appellants contend their convictions are invalid, because the lower court erred in admitting into evidence post conspiracy statements of co-defendants. In addition, the appellant Marroso contends that the lower court erred in failing to grant his motion for mistrial because of the admission into evidence of the testimony of an F.B.I. agent concerning the termination by Marroso of an interview with the agent on advice of counsel.

After a careful examination of the entire record, we find to the contrary. The evidence sustained the conviction of both appellants. A common purpose and plan may be inferred from a development and a collocation of circumstances. *Glasser v. United States*, 315 U.S. 60 (1942). It is well settled that, in a joint trial, post conspiracy declarations by co-defendants are admissible against the declarant under proper limiting instructions. *Delli Paoli v. United States*, 352 U.S. 232 (1957). The court gave precise limiting instructions both prior to the receipt of the statements and in the final charge.

Lastly, it was not error to fail to grant the motion for mistrial because of the admission into evidence of the testimony of the F.B.I. agent concerning his interview with Marroso wherein Marroso answered certain questions and

---

* Judge Cameron, the third judge constituting the Court originally hearing this case, died after argument but before decision. Consequently, this decision and opinion is rendered by a quorum pursuant to Title 28 USCA, § 46(c) and (d).

then refused to answer further questions on advice of counsel. This was no more than evidence of surrounding circumstances tending to illuminate the principal fact in such a way as to reflect the entire transaction or conversation and place the whole in a true light.

The convictions are AFFIRMED.

(2403-4)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:	
Bryson v. *United States*, 238 F. 2d 657, certiorari denied, 355 U.S. 817	8
Escobedo v. *Illinois*, 378 U.S. 478	10
Massiah v. *United States*, 377 U.S. 201	10
Constitution and statute:	
U.S. Constitution, Fifth Amendment	9
18 U.S.C. 2314	2
18 U.S.C. 3481	9
Miscellaneous:	
McCormick, *Handbook of the Law of Evidence*	8

748-244—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 372

SAMUEL J. MARROSO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 471

JOHN JACOB SAMARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals is reported at 331 F. 2d 601 (Pet. No. 372, App. B; Pet. No. 471, App. A).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1964. Petitions for rehearing were de-

nied on July 8, 1964. On August 11, 1964 Mr. Justice Black extended the time for filing a petition for a writ of certiorari in No. 372 until August 14, and the petition was filed on August 11. On August 4, 1964 Mr. Justice White extended the time for filing a petition in No. 471 until September 7 (Labor Day) and the petition was filed on September 8. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the verdict (No. 471).

2. Whether there was any violation of petitioners' rights under the Fifth or Sixth Amendments, or under 18 U.S.C. 3481, when an F.B.I. agent, testifying in detail as to an interview he had conducted with petitioner Marroso, stated that Marroso had terminated the interview on advice of counsel (Nos. 372 and 471).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to transport counterfeit securities in foreign commerce in violation of 18 U.S.C. 2314, and of a substantive violation of the same statute. Petitioner Samarin was sentenced to five years' imprisonment on both counts, the sentences to run concurrently. Petitioner Marroso was sentenced to three years' imprisonment on the conspiracy count and was placed on probation for three years on the substantive count. The court of appeals affirmed *per curiam*.

The evidence may be summarized as follows:

Some time during the summer of 1960, petitioner Samarin went to the office of a stockbroker in Cleveland and requested an Ohio Turnpike bond in "street form," explaining that he had an opportunity to make "big money"; that he wished to counterfeit the bond; that the counterfeit bonds would be used by a South American banker to replenish an estate some of whose funds had been loaned to a union in Detroit; and that after the estate had been audited and the union had repaid the loan, the bonds would be destroyed and never go into circulation (R. 71–73, 99, 106).

Samarin obtained one genuine Turnpike bond in October, 1960 (R. 361–364, 439–441). Thereafter he approached three printers and asked them if they could print "certificates" or "bonds", having specified certain characteristics which corresponded to those of the genuine Turnpike issue (R. 164, 174–175, 185, 513–514, 525–526). He told one printer "It's a little shady" (R. 165).

Petitioner Marroso was from Detroit and had authority over or access to funds of the Teamsters' Union (R. 230, 263, 399). He and Samarin had been seen together in June, 1960 at Samarin's residence (R. 397–398, 401–402). During the last week of 1960, Hyman Green, an acquitted co-defendant in this case, gave his friend Martin Von Zamft, president of the Bank of Miami Beach, a list of 265 or 266 Ohio Turnpike bonds and requested that he ascertain whether those bond numbers were free of claims (R. 219–224). Green, who was the director of a bank in Nassau, Bahamas, told Von Zamft that the owner of

the bonds wanted them sold through Green's Nassau bank (R. 225, 247). Later the same week, Green and petitioner Marroso left 266 Ohio Turnpike bonds with Von Zamft for safekeeping (R. 233–236, 243, 245). On January 3, 1961, an employee of the Bank of Miami Beach made telephone inquiries with regard to the bond numbers specified by Green, and learned that five of them had previously been cancelled (R. 60–66, 223–224, 333, 337, 345). On the same day, January 3, a telephone call was made from petitioner Marroso's Miami hotel room to a party named "Samarin" in Cleveland (R. 391). The telephone number called from Miami was that of a house in a Cleveland suburb, and it was established that Samarin was residing there at the time of the call (R. 395–396).

On January 9, Von Zamft returned the 266 Turnpike bonds to petitioner Marroso in Miami; the same day Marroso, arriving in Nassau, handed a package to Green (R. 276, 288, 290, 298–299). The Nassau bank of which Green was a director handled several "X" or confidential accounts, one of which was utilized in the negotiation of some of the counterfeit bonds at issue here (R. 249–250, 294–296, 313–315).

Within three days of Marroso's trip to Nassau, he and Green took 265 Turnpike bonds to a broker's office, where a sale was negotiated (R. 299–303, 321). The bonds were shipped to New York purchasers, who discovered that they were counterfeit (R. 125, 149, 191–192, 312). The bonds sold in Nassau did not include the five numbers which, upon the inquiry previously instigated by Green, were found to have

been cancelled (R. 312, 355). All the counterfeits had been made from the genuine bond which Samarin possessed in October (R. 514–521, 524, 532).

After newspapers had publicized the negotiation of certain counterfeit Ohio Turnpike bonds, petitioner Samarin approached the broker to whom he had originally mentioned the counterfeiting proposal and told him that the "deal" had not gone through (R. 77).

Petitioner Marroso, questioned by an F.B.I. agent, denied ever having had possession of any Ohio Turnpike bonds, genuine or otherwise, and stated further that he knew of no one who had such bonds. He denied having attended any meetings with Green in Nassau and declared that he could not recall whether he had seen Green in Nassau or in Miami (R. 445–446).

ARGUMENT

1. Contrary to petitioner Samarin's contention, there was substantial evidence to support the jury's finding that the forged bonds were transported to Nassau and that he, Samarin, was implicated in that transportation. As we have shown, the record established that about two weeks prior to the sale of the counterfeit bonds in Nassau, Green asked a Miami banker to check out a list of 265 or 266 Ohio Turnpike bearer bonds in the "132,000" series (R. 342); that, shortly afterward, Green and Marroso deposited 266 Ohio Turnpike bearer bonds with a Miami banker for temporary safekeeping; that on January 9, 1961, the very day these bonds were returned to Marroso, he flew to Nassau and there handed a package over to Green; that within two days Green and Marroso

had begun negotiations for the sale of 265 Ohio Turnpike bonds; and that on January 13, 1961, four days after Marroso's receipt of the 266 bonds in Miami and his flight to Nassau, the counterfeit bonds here at issue, all belonging to the "132,000" series, were sold to New York purchasers. In these circumstances, the jury could readily find that the forged bonds sold by Green and Marroso had been transported by Marroso from Miami to Nassau.

Samarin's participation is also inferable from the record. It was shown that Samarin had sought to obtain an Ohio Turnpike bond for the declared purpose of counterfeiting it; that he did manage to secure such a bond and approached three printers with a view to duplicating its characteristics; that the counterfeit bonds sold by Marroso and Green in Nassau were forged copies of the model bond procured by Samarin; that Samarin and Marroso had been seen together and had engaged in business discussions on at least two occasions during the months preceding the sale of the bonds; and that Marroso in Miami had placed a telephone call to Samarin in Cleveland only a few days before the transportation of the bonds to Nassau. In addition, the proposed counterfeiting scheme, as described by Samarin to a Cleveland stockbroker, involved a South American banker and a Detroit union, and the evidence showed that Marroso, who lived in Detroit, was connected with the Teamsters Union and collaborated in the sale with Green, a Nassau banker. From these facts the jury could reasonably conclude that Samarin was an accessory to the illegal transportation.

2. The F.B.I. agent who interviewed Marroso took the witness stand and gave a detailed description of the interview from beginning to end. He testified, *inter alia*, that Marroso denied having possessed Ohio Turnpike bonds and did not recall having seen Green either in Nassau or Miami; that when questioned as to why he had been in Florida at the time here relevant, Marroso asked to be excused to consult his attorney, who had accompanied him to the F.B.I. office; and that, after consulting him, Marroso "came back and said that his attorney had instructed him not to answer any more questions, and that terminated the interview" (R. 444–446). In his opening remarks, the prosecutor, previewing the testimony which the government would offer, summarized the F.B.I. agent's description of the interview, including the manner in which it terminated (R. 26). Defense counsel moved unsuccessfully for a mistrial on three occasions, claiming that the prosecutor's opening comments and the agent's testimony were unduly prejudicial to petitioners (R. 26, 413–415, 448). In this Court, petitioners contend that the comments and testimony abridged their privilege against self-incrimination under the Fifth Amendment, impaired their right to counsel under the Sixth Amendment, and violated their statutory right not to testify under 18 U.S.C. 3481.[1] These contentions, we submit, are groundless.

---

[1] Neither at trial nor before the court of appeals was there any contention by petitioner Samarin as to the propriety of the evidence in question. He now asserts for the first time (Pet. No. 471, pp. 13–17) that the evidence relating to the

We note first that, under familiar rules of evidence, the testimony in question was relevant, and was admissible for the purpose of giving the jury a complete and intelligible picture of the interview. Without that evidence, the jury would have been at a loss to understand the abrupt cessation of the questioning or might have drawn the erroneous inference that the interview had embraced other significant questions and answers about which the agent had not testified. As the court of appeals stated, "this was no more than evidence of surrounding circumstances tending to illuminate the principal fact in such a way as to reflect the entire transaction or conversation and placing the whole in a true light" (331 F. 2d at 602). Thus, whether the evidence be viewed from the standpoint of "testimonial completeness" (see *Bryson* v. *United States,* 238 F. 2d 657, 661 (C.A. 9), certiorari denied, 355 U.S. 817), or "res gestae" (see *Rogers* v. *United States,* 334 F. 2d 83, 86 (C.A. 5)), it was appropriate to "permit the witness to tell his story in a natural way by telling all that happened at the time of the narrated incident including those details which give light and color to the story. * * * " McCormick, *Handbook of the Law of Evidence* (1954) 587.

---

termination of the Marroso interview was prejudicial to his cause. We think it plain that if there was some infringement of Marroso's rights—which we do not concede—that was a personal matter relating only to Marroso. Particularly is this so where, as here, the judge carefully instructed the jury on numerous occasions that post-conspiracy statements were to be considered only against the respective declarants (R. 437, 447, 460, 618–619, 628).

The prosecutor's remarks and the agent's testimony in no way infringed petitioners' privilege against self-incrimination. In terminating the interview, Marroso did not invoke any constitutional privilege; nor was there any occasion for him to do so. He was not under arrest or under indictment at the time, and there is no indication that the agent was exerting pressure upon him to extract a confession. On the contrary, Marroso came voluntarily to the F.B.I. office, was accompanied by his attorney, and freely responded to a dozen questions before deciding to break off the dialogue. He was at liberty to discontinue the interview and to walk out of the office at any time and for any reason he chose, without resort to the Fifth Amendment and without regard to whether his answers might be self-incriminating. The prosecutor in no way suggested that Marroso had relied upon the Fifth Amendment, much less that there was anything inculpatory in his refusal to participate further in the interview. What was damaging about the agent's testimony was not the description of the way the interview ended, but rather the answers which Marroso gave to the first ten or twelve questions—particularly his assertions, in the face of strong contrary evidence, that he had not possessed Ohio Turnpike bonds and did not remember seeing Green either in Miami or Nassau. In these circumstances, we submit, there was no impairment of the Fifth Amendment privilege. The same considerations dispose of the contention under 18 U.S.C. 3481, which provides merely that a defendant's failure

to take the witness stand "shall not create any presumption against him."

Nor is there any basis for the conclusion that the decision below is at odds with the decisions of this Court of *Escobedo* v. *Illinois*, 378 U.S. 478, or *Massiah* v. *United States*, 377 U.S. 201, both of which dealt with the right to counsel under the Sixth Amendment. In *Massiah*, the Court held that incriminating statements elicited from the defendant by federal agents subsequent to his indictment and in the absence of his retained counsel could not, consistently with the Sixth Amendment, be introduced in evidence against him. In *Escobedo*, the Court applied the same rule to statements obtained through the interrogation of a defendant who had not yet been formally indicted, but who was in police custody and had been denied access to counsel. In the present case, Marroso was accompanied by his attorney and was free to consult with him at all times. Moreover, as we have noted, he was neither under arrest nor under indictment at the time of the questioning, and the record does not show that he had "become the accused," that "the purpose of the interrogation was to 'get him' to confess his guilt," or that "the police urged him to make a statement" (378 U.S. at 485).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME NELSON,
Attorneys.

OCTOBER 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 9 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 372

SAMUEL J. MARROSO.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

J. EDWARD WORTON,
Attorney for Petitioner,
SAMUEL J. MARROSO
548 Pan American Bank Bldg.
Miami, Florida 33131

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 372

SAMUEL J. MARROSO.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

TO the HONORABLE EARL C. WARREN, Chief Justice and the Associate Justices of the Supreme Court of the United States:

THE UNITED STATES OF AMERICA in its brief in opposition to the petitioner SAMUEL J. MARROSO's Petition for Writ of Certiorari, No. 372, has consolidated argument as respects the petition of SAMUEL J. MARROSO and the petition of JOHN JACOB SAMARIN, No. 471.

It is respectfully shown that this Honorable Court should consider the merits of the Petition for Writ of Certiorari filed by SAMUEL J. MARROSO separately and apart from the petition of JOHN JACOB SAMARIN.

As the Government states in footnote "1" commencing on page 7 of its brief:

> " * * * We think it plain that if there was some infringement of Marroso's rights — which we do not concede — that was a personal matter relating only to Marroso. * * * "

The principal argument of SAMUEL J. MARROSO is the infringement of his constitutional right to maintain silence and the subsequent prejudicial comment by the prosecutor and the F. B. I. agent to the jury concerning his silence.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

J. EDWARD WORTON,
Attorney for
SAMUEL J. MARROSO, Petitioner
548 Pan American Bank Bldg.
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that several copies of the above and foregoing Reply to Brief for the United States in Opposition was on this the 5th day of November, 1964, mailed to the Hon. William A. Meadows, United States Attorney for the Southern District of Florida, United States Courthouse, Miami, Florida; to Jerome Nelson, Attorney, Dept. of Justice, Washington 25, D. C.; and to the Solicitor General, Department of Justice, Washington 25, D. C.

J. EDWARD WORTON

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 30 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 372

SAMUEL J. MARROSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

J. EDWARD WORTON,
Attorney for Petitioner,
SAMUEL J. MARROSO,
[illegible] Pan American Bank Bldg.
Miami, Florida 33131

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 372

SAMUEL J. MARROSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

TO the HONORABLE EARL C. WARREN,
Chief Justice and the Associate Justices of
the Supreme Court of the United States:

Your petitioner, SAMUEL J. MARROSO, respectfully prays for a rehearing of the Order of this Court dated November 9, 1964 denying his Petition for a Writ of Certiorari and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT OF CERTIORARI

1. This Honorable Court granted a writ of certiorari on October 13, 1964, in the case of **DOUGLAS** v. **ALABAMA**, No. 313, October Term 1964, 33 U. S. Law Week 3144.

This petitioner respectfully submits that the constitutional question to be resolved by this Court in **DOUGLAS** v. **ALABAMA**, supra, **directly affects** and **bears** upon the constitutional question presented by this petitioner in his Petition for a Writ of Certiorari dated August 7, 1964.

Thus, the rehearing prayed for here should be granted, since the constitutional question pending before this Court in **DOUGLAS** v. **ALABAMA**, supra, has not been determined and petitioner is without further recourse to determine the abridgment of his constitutional rights which will result in his incarceration.

2. Certiorari was confined to the following question in **DOUGLAS** v. **ALABAMA**, supra:

> "Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant."

3. Although the facts in **DOUGLAS** v. **ALABAMA**, supra, differ from those in the instant case, the basic constitutional question involved remains the same.

Specifically, the right of the petitioner here to exercise his Fifth Amendment privilege against self-incrimination coupled with Section 3481 of Title 18 United States Code, which together include complete freedom from "prejudicial and inflammatory" comment during the petitioner's criminal jury trial.

4. The petitioner here was denied his constitutional rights when the trial court, over objection, allowed the prosecutor and a government witness to comment on the fact that the petitioner had exercised his privilege against self-incrimination. Therefore, the petitioner's right to a "fair trial" under the Sixth Amendment has also been denied.

5. In **DOUGLAS** v. **ALABAMA**, supra, a convicted accomplice was called to the stand by the prosecutor who knew the accomplice would refuse to testify.

Whereas, here the glaring error of the constitutional violation against petitioner MARROSO is far more blatant because both the prosecutor and the government witness commented on the petitioner's exercising his privilege against self-incrimination during the jury trial.

6. It is respectfully requested that this Honorable Court should consider the merits of the Petition for Rehearing of Order Denying Petition for Writ of Certiorari filed by SAMUEL J. MARROSO separately and apart from the petition of JOHN JACOB SAMARIN.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari be issued to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. EDWARD WORTON
Attorney for
SAMUEL J. MARROSO,
Petitioner
548 Pan American Bank Bldg.
Miami, Florida 33131

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

J. EDWARD WORTON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that several copies of the above and foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari was on this the 27 day of November, 1964, mailed to the Hon. William A. Meadows, United States Attorney for the Southern District of Florida, United States Courthouse, Miami, Florida; to Jerome Nelson, Attorney, Dept. of Justice, Washington 25, D. C.; and to the Solicitor General, Department of Justice, Washington 25, D. C.

J. EDWARD WORTON

Office-Supreme Court, U.S.
FILED
DEC 1 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 471

JOHN JACOB SAMARIN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Of Counsel:
SHEA & GARDNER
734—15th Street, N.W.
Washington 5, D.C.

ALFRED L. SCANLAN,
734—15th Street, N.W.
Washington 5, D.C.
JAMES EASLY,
524 Terminal Tower Building,
Cleveland, Ohio.
Attorneys for Petitioner.

December 1, 1964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 471

JOHN JACOB SAMARIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of November 9, 1964 denying the petition for writ of certiorari, 379 U.S. ——, and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case, as prayed for in the petition filed with this Court on September 8, 1964.

Reasons for Granting Rehearing and Issuing the Writ

1. On October 13, 1964, this Court granted a writ of certiorari in the case of *Douglas* v. *Alabama*, No. 313, October Term, 1964, 379 U.S. ——, unofficially reported in 33 U.S. Law Week 3144.[1] For reasons stated herein below, petitioner believes that the issue raised by the

[1] The decision below is reported at 163 So. 2d 477 (Ala. App., 1963).

Court's grant of the writ in *Douglas* v. *Alabama, supra,* may bear directly upon and support the second ground assigned by the petitioner in his petition of September 8, 1964 as a justification for the issuance of certiorari in this case.

2. The petitioner filed his petition for certiorari in this Court on September 8, 1964. After securing an extension of time in which to answer on October 15, 1964, the Government filed its opposition on October 27, 1964. This Court had granted certiorari in *Douglas* v. *Alabama* on October 13, 1964. Petitioner concedes that he could have brought *Douglas* v. *Alabama, supra,* to the attention of the Court in a reply brief timely filed before the announcement of a denial of certiorari in this case on November 9, 1964. However, petitioner was in difficult personal and financial circumstances at the time. As a consequence, he was not financially able to authorize his attorneys to file a reply brief. Petitioner was aware that his Washington counsel had advised Ohio counsel by letter of his opinion that this Court's grant of certiorari in *Douglas* v. *Alabama* encompassed an issue analogous to, and supported, petitioner's claim that he was substantially prejudiced by the trial court's sanctioning of an impairment of his co-defendant's privilege against self-incrimination at the trial leading to their conviction. However apart from his then pressing financial situation, petitioner believed that this Court's grant of the writ in *Douglas* v. *Alabama,* presaged its issuance in this case. A reply, he felt, even if he could have authorized that it be prepared and filed, was therefore unnecessary.

3. Nevertheless, a petition for rehearing of a denial of a petition for writ of certiorari "is not to be deemed an empty formality . . ." A denial of a petition for certiorari "should not be treated as a definitive determination

in this Court, . . ." *Flynn* v. *United States*, 348 U.S. 909, 99 Law Ed. 1298, 1299. The Court has granted petitions for rehearing based on the claim that the same or related issues were before the Court in other cases still pending. *Pickett* v. *Union Terminal Co.*, 313 U.S. 591, 314 U.S. 704, 315 U.S. 386, 394; Stern & Gressman, Supreme Court Practice, (3rd Ed.) p. 389; Robertson & Kirkham, Jurisdiction of the Supreme Court of the U.S. (Wolfson & Kurland Ed.) p. 613. Counsel for petitioner believe, therefore, that they are justified under Rule 58 of the rules of this Court in filing this petition for rehearing, despite the fact that the matter it now raises could have been presented to the Court in a timely reply brief, had petitioner's personal situation permitted it.

4. In *Douglas* v. *Alabama*, 379 U.S. ——, this Court granted certiorari limited to the following question:

> "Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant."[2]

5. The basic facts in *Douglas* v. *Alabama* are these: An accomplice who had been convicted the day before petitioner was brought to trial had been called by the state as a witness against him. After the witness had answered a few preliminary questions, some straightforwardly, others evasively, the prosecution attempted to question the accomplice about an alleged written confession on his part. The accomplice refused to answer, insisting

[2] 33 U.S. Law Week 3128, October 13, 1964.

on his privilege against self-incrimination. The prosecution then went on to put a series of questions to the witness, all relating to paragraphs of the alleged confession for the purported purpose of refreshing his recollection. Although not clear, the record suggests, and the Court of Appeals of Alabama took it, that counsel for Douglas, the petitioner, had waived any claim of prejudice at the trial by failure to make timely objection when the state solicitor attempted to refresh the recollection of the accomplice by posing questions relating to various paragraphs of the latter's alleged confession.

6. In the instant case, petitioner argues, and has asserted as a ground in support of his petition for certiorari, that the trial court, in permitting a substantial impairment of his co-defendant's privilege against self-incrimination, also sanctioned thereby the prejudicial use against the petitioner as well as the co-defendant of improper and highly damaging testimony. *Cf. McDonald* v. *United States*, 335 U.S. 451, 456; *Anderson* v. *U.S.*, 318 U.S. 350, 356-7. In both cases, the alleged accomplice had made timely claim of the privilege; in both cases, the claim was effectively circumvented at trial. On the facts, however, this petitioner would seem to assert an even stronger claim than that which sufficed to cause this Court to grant certiorari in *Douglas* v. *Alabama*, *supra*, where the record suggests that there the petitioner may have waived his right by his counsel's failure to make timely objection at trial. Moreover, unlike the Alabama case, the case at bar does not give rise to the sometimes delicate and difficult decision as to whether this Court should interdict state criminal procedure in order to guarantee the fundamental fairness of the proceedings leading to petitioner's conviction.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari be issued to the Court of Appeals for the Fifth Circuit. Alternatively, petitioner asks that the Court vacate its order of November 9, 1964, denying certiorari herein, pending the Court's ultimate decision in *Douglas v. Alabama, supra.*

Respectfully submitted,

Of Counsel:
SHEA & GARDNER,
734—15th Street, N.W.,
Washington 5, D.C.

/s/ ALFRED L. SCANLAN,
734—15th Street, N.W.,
Washington 5, D.C.

JAMES EASLY,
524 Terminal Tower Building,
Cleveland, Ohio.
Attorneys for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

/s/ ALFRED L. SCANLAN.

Filed: December 1, 1964.